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Nos. 03-109 and 03-123

IN THE

Supreme Court of the United States

ANN M. VENEMAN, SECRETARY OF AGRICULTURE, *et al.*,
Petitioners,

v.

MONTANA WILDERNESS ASSOCIATION, INC., *et al.*,
Respondents.

BLUE RIBBON COALITION, INC., *et al.*,
Petitioners,

v.

MONTANA WILDERNESS ASSOCIATION, Inc., *et al.*,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether this Court should accept review of this case at an interlocutory stage when the District Court has not determined whether the Forest Service violated any statute and has not ordered the agency to take any action.

2. Whether the Court of Appeals erred in holding that the District Court has authority under the Administrative Procedure Act to consider whether the Forest Service has failed to comply with a federal statute dictating that the Forest Service "*shall*, until Congress determines otherwise," administer certain Wilderness Study Areas in Montana so as "to maintain their presently existing wilderness character and potential for inclusion in the National Wilderness Preservation System."

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondents hereby disclose that they are nongovernmental corporations, but do not have any publicly issued shares, and further disclose there is no parent or publicly held company owning 10% or more of the stock of any of these corporate Respondents.

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BRIEF IN OPPOSITION OF RESPONDENTS

Respondents Montana Wilderness Association, Inc., Friends of the Bitterroot, Inc. and American Wildlands, Inc. respectfully submit this brief in opposition to the petitions for certiorari filed by the Solicitor General in No. 03-109[1] and by Petitioners Blue Ribbon Coalition, Inc., *et al.*, in No. 03-123.

STATEMENT

In the Montana Wilderness Study Act, Pub. L. No. 95-150, 91 Stat. 1243 (1977), Congress designated nearly one million acres of land in Montana as wilderness study areas, and

[1] This brief refers to the Petition for a Writ of Certiorari filed by the Solicitor General as "Pet.," and its appendix as the "Pet. App."

it ordered that those study areas "*shall*, until Congress determines otherwise, *be administered by the Secretary of Agriculture so as to maintain their presently existing wilderness character* and potential for inclusion in the National Wilderness Preservation System." *Id.* § 3(a) (emphasis added). The District Court found in this case that the Forest Service, which administers these lands, "has failed to consider whether, how, and to what extent its management decisions have impacted the wilderness character of the areas as they existed in 1977, as the statute requires," Pet. App. 26a-27a, and granted summary judgment for plaintiffs. The Court of Appeals affirmed in part but reversed the grant of summary judgment, finding that "the record reveals a genuine issue of material fact as to whether the Forest Service has discharged its duty to administer the Study Areas so as to maintain their wilderness character and potential for inclusion in the Wilderness System." *Id.* at 10a. Thus, at this stage of the litigation, no relief has been awarded against the federal defendants, and it remains unclear whether any obligations of any kind ever will be imposed upon them.

Nevertheless, the Solicitor General and other petitioners seek review of the determination of the Ninth Circuit that the District Court may *consider*, under § 706(1) of the Administrative Procedure Act and potentially other provisions, whether the Forest Service has failed to comply with its mandatory, nondiscretionary duty to administer the study areas so as to maintain their wilderness character and potential for inclusion in the wilderness system, as Congress explicitly directed. Similarly, in a second case in which the Solicitor General and others have filed petitions for certiorari challenging the scope of judicial review under § 706(1), the Tenth Circuit has ruled only that the District Court may consider at trial whether the Bureau of Land Management has failed to administer other wilderness study areas in Utah "in a

manner so as not to impair the suitability of such areas for preservation as wilderness," as required by the Federal Land Policy and Management Act, 43 U.S.C. § 1782(c). *Southern Utah Wilderness Alliance v. Norton*, 301 F.3d 1217 (10th Cir. 2003), *petitions for cert. filed*, 72 U.S.L.W. 3105 (U.S. July 18, 2003) (No. 03-101); 71 U.S.L.W. 3751 (U.S. May 19, 2003) (No. 02-1703).

There is no reason for the Court to hear either of these cases at this time. The Ninth Circuit simply has held that the Forest Service's alleged failure to comply with a mandatory, nondiscretionary duty may be *challenged* under § 706(1). In essence, the court ruled only that the District Court may consider the merits of the case. The § 706(1) issue has not been finally resolved in either of these cases, and the issues, factual record and claims in each case inevitably will evolve as the cases proceed further in the courts below. In addition, the decisions of the Ninth and Tenth Circuits do not conflict with prior decisions of this Court or of other circuits, and the limited rulings of the courts in these cases are fully consistent with the principles of judicial review set forth in the APA.

There is an additional reason not to "hold" the petition for certiorari in this case, as the Solicitor General requests. This case has been pending since 1996, and the Ninth Circuit has reversed the judgment of the District Court and remanded the case for further factual development. Even if this Court were to grant the petitions in the *Southern Utah Wilderness* case, there is no question but that the District Court and the Ninth Circuit here will follow whatever rulings this Court may make concerning the scope of judicial review under § 706(1). There is no reason to hold in abeyance for up to a year the further factual development ordered by the Ninth Circuit. For the reasons set forth in this opposition, however, Respondents respectfully submit that the petitions for certiorari in both cases should be denied.

A. The Underlying Statutory Scheme.

In 1967, the Forest Service undertook an inventory of certain roadless and undeveloped areas in national forests. Pet. App. 15a. Nine specific wild areas in Montana, which the Forest Service rejected for further wilderness study, *id.*, became the subject of special congressional attention. These areas encompass high mountain peaks, alpine lakes and deep forested valleys – pristine, wild expanses that Congress determined deserved further consideration for possible wilderness designation. In 1977, Congress enacted the Montana Wilderness Study Act ("MWSA") to "provide for the study of certain lands to determine their suitability for designation as wilderness." Pub. L. No. 95-150, 91 Stat. 1243 (1977). The Act mandates that the Secretary of Agriculture "*shall*, until Congress determines otherwise," administer nine specific Wilderness Study Areas ("WSAs") in Montana so as "to maintain their presently existing wilderness character and potential for inclusion in the National Wilderness Preservation System." *Id.* § 3(a) (emphasis added).

The statute allowed five years for study and two years for executive review and recommendations. *Id.* § 2. Thus, Congress intended that, within seven years after the Act was passed, it would determine, based on recommendations of the President, whether or not the nine wilderness study areas should be included in the Wilderness System. Over 25 years later, Congress has made a final decision with respect to only two of the study areas. Thus, the Secretary remains subject to Congress's command, set forth in the MWSA, that the Forest Service shall maintain the "existing wilderness character" of the remaining seven study areas and their potential for inclusion in the Wilderness System.

B. The Administrative Procedure Act.

As this Court has emphasized, the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*, codifies a broad presumption in favor of judicial review of agency action. *Abbott Labs. v. Gardner*, 387 U.S. 136, 140-41 (1967). The APA applies not only to "agency action made reviewable by statute," but also to any other "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. Any person "adversely affected or aggrieved by agency action" may seek review. *Id.* § 702.

Section 706(1) of the APA provides that federal courts "shall" "compel agency action unlawfully withheld or unreasonably delayed." Section 706(2)(A) authorizes a court to "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." The "agency action" at issue in each provision is specifically defined by the APA to include "failure to act." 5 U.S.C. § 551(13). However, the Act provides that a court may not review an agency's activities "to the extent that (1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." 5 U.S.C. § 701(a).

C. The Proceedings Below.

1. The Montana Wilderness Association and other plaintiffs ("MWA") filed suit on October 9, 1996, alleging that the Forest Service had "unlawfully withheld or unreasonably delayed" action, 5 U.S.C. § 706(1), or had acted arbitrarily and capriciously or had abused its discretion, § 706(2)(A), by failing to maintain the wilderness character of the seven study areas for which Congress has not yet acted. In particular, MWA contended that the Forest Service had allowed vastly increased use of snowmobiles and four-wheeled all-terrain vehicles ("ATVs") in the study areas to such an extent that the

wilderness qualities of the areas as they existed in 1977 were lost. MWA alleged that the Forest Service had allowed traditional "pack and saddle" trails to be converted into motorized routes that resembled roads, and had allowed ATVs – which were not commercially available in 1977 – to use these trails.[2] This explosion of motorized use not only caused physical damage to the study area lands, but also impaired the opportunities for solitude that is an essential attribute of wilderness character. MWA further alleged that the Forest Service had permitted this significant increase in motorized use without making any formal, reviewable decision. Indeed, an important aspect of plaintiffs' claim is that the Forest Service is creating wider trails or standing by and allowing ATVs to do so *without* developing any reviewable plan or environmental impact analysis. MWA alleged that rarely, if ever, has the agency even considered whether the "presently existing wilderness character" of the study areas is being maintained. Plaintiffs challenged the agency's failure to act in accordance with the nondiscretionary mandate of the MWSA under both § 706(1) and § 706(2)(A) of the APA.

Recreationists seeking greater motorized use in the study areas were allowed to intervene in the suit ("Coalition"). Among other preliminary motions, the Coalition moved to dismiss the action, arguing that the MWSA was not subject to judicial review under the APA. Contrary to the position it is now urging in this Court, the Forest Service acknowledged the District Court's jurisdiction to consider plaintiffs' claims under

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[2] The legislative history of the MWSA revealed that occasional motorized use had occurred in some of the WSAs and that Congress expected that such use would continue. This sporadic motorized use had been sufficiently limited, however, such that it did not impede Congress from declaring that the areas deserved further wilderness consideration. MWA has never argued that motorized use *per se* is prohibited by the Act.

§ 706(1). Order, *MWA v. United States Forest Serv.*, CV 96-152-M-DWM, at 4 (D. Mont. Feb. 13, 1998). The District Court denied the motion to dismiss, ruling that the MWSA "is not a 'general statutory mandate to protect resource values' as suggested by the Coalition, but rather a specific congressional order directed at specific designated areas of federal land within Montana." *Id.* at 5.

The parties then submitted cross-motions for summary judgment on certain counts. Plaintiffs tendered extensive evidence in support of their allegations that the Forest Service had failed to prevent "substantially increased motorized use of [the] WSAs, which has resulted in increased environmental damage, disruption of wildlife and despoiling of aesthetic values," all in derogation of Congress's explicit mandate in the MWSA that the Forest Service maintain the existing wilderness character of the study areas and their potential for inclusion in the wilderness system. Pet. App. 14a. The Forest Service did not deny that motorized use had increased in the study areas.

In its assessment of the summary judgment motions, the District Court focused primarily on an issue of statutory construction. The Forest Service argued that it need *not* "maintain [the] presently existing wilderness character" of the wilderness study areas, Pub. L. No. 95-150, § 3(a), so long as it preserved their "potential for inclusion in the National Wilderness Preservation System," *id.* *See* Pet. App. 21a. Under this view, new trails for motorized use in the wilderness areas could be allowed, so long as the traces of those trails could be removed within a reasonable time after Congress selected the area for designation as wilderness. *Id.* As summarized by the District Court: "The Forest Service and the Intervenors do not argue that motorized use has not increased, nor do they argue that this increased use has had no effect on the Wilderness Study Areas. Rather, they argue that whatever

motorized use is now allowed does not compromise the areas' potential for designation as Wilderness Areas." *Id.*

The District Court rejected this interpretation of the statute. Consistent with *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the court based its analysis on the MWSA's plain language. The District Court observed that Congress had not used the identical phrases contained in § 3(a) in any other statute. Pet. App. at 19a. But employing an ordinary canon of statutory construction, the court sought to import meaning to *both* phrases in § 3(a) so that neither was rendered superfluous. *Id.* at 21a. The court explained: "To accept the Forest Service's argument, one must ignore the first phrase of Congress' imperative. . . . Under the Defendants' and Intervenors' reading, the phrase 'presently existing wilderness character' is surplusage. . . . To ignore part of what Congress said in a statute is not reasonable, even under a deferential reading." *Id.* The court thus held:

> Because the Forest Service has interpreted the Act to require only that the areas' potential for wilderness designation be maintained, it has failed to consider whether, how, and to what extent its management decisions have impacted the wilderness character of the areas as they existed in 1977, as the statute requires. I conclude that the Forest Service has "unlawfully withheld or unreasonably delayed" its maintenance of the Montana Wilderness Study Areas' 1977 wilderness character. 5 U.S.C. § 706(1); Complt. at 7, ¶ 12. Plaintiffs are entitled to summary judgment on Count I.

Pet. App. 26a-27a. Having so ruled, the District Court did not consider whether the Forest Service's failure to maintain the

wilderness character of the study areas was arbitrary and capricious or an abuse of the agency's discretion in violation of § 706(2)(A) of the APA, as also alleged by the MWA.

The District Court did consider other specific claims brought by plaintiffs. The court granted summary judgment for MWA on Counts III and VI of the complaint, ruling that the Forest Service had abused its discretion and acted arbitrarily and capriciously, 5 U.S.C. § 706(2)(A), and had acted "short of statutory right," *id.* § 706(2)(C), in conducting particular trail maintenance and improvement activities in specific WSAs without developing "discernible criteria for assessing and maintaining the wilderness character" of those areas. Pet. App. 27a.

Lastly, the District Court fashioned a remedy for the violations it had found. The court did not compel the Forest Service to exercise its discretion in any particular way or order any type of wholesale revision of the agency's management of the wilderness study areas. Rather, the court concluded that "[t]he appropriate remedy is to allow the Forest Service to consider its management of the Montana Wilderness Study Areas in light of the correct statutory standard." *Id.* at 28a. Thus, it ruled that plaintiffs were entitled to declaratory and injunctive relief requiring the Forest Service "to comply with the statute" and "to take reasonable steps to restore the wilderness character of each Montana Wilderness Study Area if its wilderness character has been diminished since 1977." *Id.* The language of the court's injunction simply tracked the language of the statute. *Id.* at 30a.

2. On appeal, the Ninth Circuit, in a unanimous decision written by Judge Trott, affirmed in part, reversed in part, and remanded for further proceedings. With regard to the § 706(1) issue, the Court of Appeals observed at the outset that judicial review is permissible if plaintiffs make a showing of

"'agency recalcitrance . . . in the face of a clear statutory duty or . . . of such a magnitude that it amounts to an abdication of statutory responsibility.'" Pet. App. at 7a (quoting *ONRC Action v. BLM*, 150 F.3d 1132, 1137 (9th Cir. 1998)). The court emphasized that agencies cannot be compelled to abide by mere generalized statements of policy in a statute, but it found that the MWSA "does more than provide a mere policy statement or general guidance; it establishes a management directive requiring the Forest Service to administer the Study Areas to 'maintain' wilderness character and potential for inclusion in the Wilderness System." Pet. App. at 8a-9a. Contrasting an earlier case that did not involve such a "clear duty" to act, the court stated that "the Forest Service's duty to maintain wilderness character and potential is a nondiscretionary, mandatory duty that it may be compelled to carry out under Section 706(1)." *Id.* at 9a. The court also concluded that the Forest Service could not insulate itself from all review by taking some action, however minimal:

> Here, the duty is to maintain a specified goal, *i.e.*, wilderness character and potential for inclusion in the Wilderness System. . . . While the Forest Service recited the requirements of the Act in some of its decisions, those decisions did not assess whether wilderness character and potential had actually been maintained in the Study Areas. The simple fact that the Forest Service has taken some action to address the Act is not sufficient to remove this case from section 706(1) review.

Id. at 9a-10a.

On the merits, however, the Court of Appeals reversed and remanded for further proceedings. The court ruled that a violation of the MWSA and § 706(1) was not established

simply because the Forest Service had failed to *consider* the impact of its decisions on the wilderness character of the study areas as it existed in 1977. Rather, "a simple failure to consider without more is not enough to violate the duty *if* the area has been 'administered so as to maintain [its] presently existing wilderness character and potential for inclusion' in the Wilderness System." *Id.* at 10a (emphasis in original; alteration in original). The court found that "[t]he Forest Service presented sufficient evidence to support its claim that it has administered the Study Areas so as to maintain wilderness character and potential," *id.*, while noting that the plaintiffs had submitted evidence indicating the opposite. The court thus held that the record revealed a genuine issue of material fact. Accordingly, it reversed the District Court's grant of summary judgment, vacated the injunction, and remanded for trial.

The Court of Appeals also reversed the District Court's determination that the Forest Service had violated § 706(2)(A) of the APA through its specific trail maintenance and improvement work in two of the wilderness study areas. The court concluded that this "routine maintenance work" was not "final agency action" reviewable under the APA. Pet. App. 6a. The court quoted this Court's statement in *Lujan v. National Wildlife Federation*, 497 U.S. 871, 899 (1990), that plaintiff "cannot demand a general judicial review of the BLM's day-to-day operations." Pet. App. 7a. The court held that trail maintenance activities were merely an interim aspect of the Forest Service's planning process, rather than the consummation of it, and did not fit any of the statutorily defined categories for agency action. *Id.* The court noted, however, that these activities could be considered in connection with plaintiffs' allegation that the Forest Service had failed to comply with its mandatory duty to maintain the wilderness

character of the study areas and their potential for inclusion in the wilderness system. *Id.* at 7a n.3.

REASONS TO DENY THE PETITIONS

I. Review Should Be Denied Because of the Interlocutory Posture of this Case.

This Court has a long tradition of declining to exercise its certiorari jurisdiction over cases that "await final judgment in the lower courts." *Virginia Military Institute v. United States*, 508 U.S. 946 (1993) (Scalia, J., concurring in denial of certiorari). This tradition is based on the "pruden[ce]" inherent in allowing lower courts to resolve and clarify issues so that this Court may conserve its limited resources. *Id.* The pending proceedings ordered by the Ninth Circuit in this case provide textbook reasons to conclude that the government's arguments for certiorari are premature. If this case proceeds in the District Court, the claims now argued by the government may be mooted, or the issues that might come before this Court for review may be significantly altered. The relevant factual record also will be further developed. The Court thus should decline jurisdiction until the lower court proceedings have run their course.

1. Although this Court's statutory grant of jurisdiction for cases arising out of the federal circuit courts does not contain a finality requirement, 28 U.S.C. § 1254(1), this Court has frequently exercised its discretion not to grant certiorari in cases for which further proceedings are pending in the lower courts. *See, e.g., American Constr. Co. v. Jacksonville, Tampa & Key West Ry. Co.*, 148 U.S. 372, 384 (1893); *Brotherhood of Locomotive Fireman and Enginemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967) (per curiam). Certiorari jurisdiction "is to be exercised sparingly, . . . [a]nd, except in extraordinary cases, the writ is not issued until final decree." *Hamilton-Brown Shoe Co. v.*

Wolf Bros. & Co., 240 U.S. 251, 258 (1916). As the Solicitor General has noted many times in the past, where "the court of appeals [has] remanded the case to the district court . . . this Court ordinarily does not review interlocutory decisions." Cert. Opp. at 6, *Tocco v. United States*, No. 02-1225 (2003); *see also, e.g.*, Cert. Opp. at 11, *Hsia v. United States*, No. 99-680 (1999). The wisdom of this position is obvious: where further proceedings remain, issues raised in a petition for certiorari may be mooted or further illuminated in the lower courts, sparing this Court from expending its resources inefficiently. While the Court is free to take cases for which further proceedings are pending, "in the absence of [an] unusual factor, the interlocutory nature of a lower court judgment will result in the denial of certiorari." Robert L. Stern, Eugene Gressman, Stephen M. Shapiro, & Kenneth S. Geller, *Supreme Court Practice* § 4.18 at 260 (8th ed. 2002).

2. This case presents no such unusual factor; to the contrary, there are strong prudential reasons to deny the petition and allow the lower courts to proceed with the case. Most obviously, lower court proceedings could moot the government's argument that 5 U.S.C. § 706(1) does not bar the type of agency non-action at issue. At this point in the litigation, the only issue that has been decided by the Ninth Circuit is that the District Court may *consider* Respondents' § 706(1) claims. Although Respondents strongly maintain that the Forest Service has violated § 706(1), it is possible that the lower courts might find that Respondents are not entitled to the relief they seek on the merits or are entitled to such relief only on wholly separate grounds, thus mooting the § 706(1) issue. Claims also can be mooted or changed by subsequent factual developments. There is no pressing need that warrants a grant of certiorari when the sole injury the government may suffer is

that it must continue to defend its position in the District Court.[3]

The premature nature of the government's arguments is brought out even more strongly by the fact that Respondents may only obtain relief that is wholly consistent with the framework the federal defendants claim is the governing law. While the government claims in these cases that further proceedings would allow the courts to "compel [agency] conduct . . . of an ongoing programmatic nature," *see* Pet. of the Solicitor General in No. 03-101 at 15, no such order was previously entered, or ever may be entered, in this case. As described further *infra* at 21-25, a court may compel an agency to make a decision or implement a duty, even if the agency retains discretion over how to carry out that duty. Thus, it is wholly possible that *if* the District Court finds after remand that the Forest Service has failed to act "to maintain [the] presently existing wilderness character" of the study areas and their "potential for inclusion" in the national wilderness system, the court merely may order the Forest Service to *comply* with its mandatory statutory duty, without dictating *how* the agency must do so. It is wholly speculative to assume that the lower courts will exert "some broader, free-ranging power to oversee agency conduct" of an "ongoing programmatic nature." Pet. of the Solicitor General in No. 03-101 at 15.

Furthermore, even if this Court were to hear this case, it would not resolve all the issues that the case may present. Although the District Court granted relief on Count I pursuant to § 706(1), an agency's "failure to act" also may constitute "final agency action," *see* 5 U.S.C. § 551(13), reviewable as arbitrary and capricious or an abuse of discretion under

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[3] A denial of certiorari at this stage will not bar the government from raising these same issues in a future petition. *See, e.g., Hamilton-Brown Shoe Co.*, 240 U.S. at 257-59.

§ 706(2)(A). Where granting certiorari would not fully dispose of the litigation, there is even less reason for this Court to hear a case in an interlocutory posture. *E.g.*, Cert. Opp. at 6, *Tocco v. United States*, No. 02-1225 (2003) (noting in criminal case that where an interlocutory petition for certiorari does not present all the issues that might come before the Court, denying certiorari "promotes judicial efficiency by ensuring that all of the defendant's claims can be consolidated and presented in a single petition to the Court"); *see also Nike, Inc. v. Kasky*, 123 S. Ct. 2554, 2557 (2003) (dismissing writ as improvidently granted and noting that "even if we were to decide the First Amendment issues presented to us today, more First Amendment issues might well remain in this case, making piecemeal review of the Federal First Amendment issues likely") (Stevens, J., concurring in dismissal of writ as improvidently granted).

Most importantly, however, denying certiorari at this stage would allow the lower courts to clarify the issues in a manner that would be useful to this Court should it ultimately decide to hear the case after the remand. This case has not yet even reached the point where a decision on the merits can be rendered. Further factual development of the issues at trial will be critical in determining whether the government's level of non-action is cognizable under §§ 706(1) or (2). The District Court alone can develop that factual record and lay a clearer groundwork for any review of the §§ 706(1) and (2) issues that is necessary in the future.

II. Review Should Be Denied Because There Is No Conflict with Decisions of This Court or Other Circuits.

Petitioners seek to manufacture a conflict between the decisions in this case and the *Southern Utah Wilderness* case, on the one hand, and this Court's decision in *Lujan v. National*

Wildlife Federation, 497 U.S. 871 (1999), and the Fifth Circuit's decision in *Sierra Club v. Peterson*, 228 F.3d 559 (5th Cir. 2000) (*en banc*), on the other. But no such conflict exists.

For three reasons, the decision in *Lujan* does not suggest that review is warranted here. One, *Lujan* is fundamentally a case about standing. 497 U.S. at 875 ("In this case, we must decide whether respondent . . . is a proper party to challenge actions of the Federal Government").

Two, the Court in *Lujan* did not even cite, much less discuss, § 706(1). Given that *Lujan* did not address the scope of judicial review under § 706(1), or the circumstances in which agency action may be found to have been "unlawfully withheld or unreasonably delayed," 5 U.S.C. § 706(1), there is no conflict with the decisions of the Ninth and Tenth Circuits at issue here.

Three, the discussion of reviewable "agency action" in *Lujan* arose in a context very different from that present here. Plaintiffs in *Lujan* did not seek to compel the government to comply with a specific statutory mandate. Rather, as characterized by the Court, plaintiffs sought to challenge in one action under the APA "'each of the 1250 or so individual classification terminations and withdrawal revocations' effected under the [BLM's] land withdrawal review program." 497 U.S. at 881 (internal citation omitted); *see also id.* at 890 (describing case as involving challenge to "the entirety of petitioners' so-called 'land withdrawal review program'"). Consistent with the nature of these allegations, the District Court initially had granted a very broad preliminary injunction prohibiting the BLM from "'[m]odifying, terminating or altering any withdrawal, classification, or other designation governing the protection of lands in the public domain that was in effect on January 1, 1981,' and from '[t]aking any action

inconsistent' with any such withdrawal, classification, or designation." *Id.* at 879-80 (internal citation omitted).

In other words, rather than challenge any particular agency action, the *Lujan* plaintiffs had lumped together over 1,000 discrete agency actions, as well as actions as yet untaken, *id.* at 891, 893, and challenged all of them as one large "program." Moreover, and critical to the Court's standing analysis, the *specific* harm that would give rise to plaintiff's standing – but which had not yet occurred – unquestionably was reviewable as final agency action. The Court emphasized that before any mining could occur that would give rise to plaintiff's standing, either a formal permit or formal notice must issue, either of which would constitute "agency action ripe for review." *Id.* at 892 n.3. In addition, before such specific agency action actually took place, "it is impossible to tell where or whether mining activities will occur." *Id.* It is thus unsurprising that the Court viewed the case solely as an attempt at "*wholesale* improvement of this program by court decree," *id.* at 891 (emphasis in original), for which the plaintiffs lacked standing.

In contrast, Respondents here challenge the Forest Service's failure to comply with a specific statutory mandate applicable to seven wilderness study areas, and no judicial review or intervention of the sort sought in *Lujan* has been countenanced in the decisions below. The District Court rejected the Forest Service's assertion that, despite the explicit language of the MWSA, it was *not* required to "maintain [the] presently existing wilderness character" of the seven study areas. To remedy this error, the court ruled that it would "*allow the Forest Service* to consider its management of the Montana Wilderness Study Areas in light of the correct statutory standard." Pet. App. 28a (emphasis added). The Ninth Circuit then reversed the District Court's grant of summary judgment, finding disputed issues of fact. At this

point in the litigation, it is wholly speculative that the Ninth Circuit would countenance "some broader, free-ranging power to oversee agency conduct" of "an ongoing programmatic nature." Pet. of the Solicitor General in No. 03-101, at 15. Indeed, the Ninth Circuit also reversed – relying explicitly on *Lujan* – the District Court's grant of summary judgment on Counts III and VI, precisely because it found that those counts challenged trail maintenance activities that did not constitute final agency action, and rather sought review of day-to-day operations. Pet. App. 7a. The Ninth Circuit's decision is hardly inconsistent with *Lujan*.

The instant case also is fundamentally different from *Lujan* in that plaintiffs here allege (and have shown) that substantial impairment of the wilderness study areas already is occurring, virtually always without any formal action being taken by the Forest Service. The Forest Service here could do *nothing* and the harm alleged by Respondents could fully and irrevocably occur. This case is thus unlike *Lujan*, where no significant mining activity could occur without the issuance of a permit. In *Lujan*, the alleged harm had not yet occurred, and it could *only* occur pursuant to a specific, reviewable decision. Here, the wilderness degradation prohibited by Congress is occurring. *Lujan* simply did not involve the core issue in this case: whether, and under what circumstances, an agency's failure to comply with a specific, mandatory duty to maintain the wilderness character of seven study areas can be reviewed as a "failure to act" under §§ 551(13), 706(1) and 706(2) of the APA.

These same differences exist with respect to the decision of the Fifth Circuit in *Peterson*. There, the Sierra Club "challenged the Forest Service's entire program of allowing timber harvesting in the Texas forests." 228 F.3d at 563. The District Court granted relief on that scale, entering a permanent injunction barring the Forest Service from allowing *any* timber

harvesting in Texas except in emergency situations. *Id.* at 565. The Fifth Circuit reversed, emphasizing that although judicial review could occur, it could only take place in the context of the specific permit approvals that would issue before any harm could be occasioned to the forest:

> Underlying the district court's opinion was a concern that finding no final agency action here "would put all of the Forest Service's on-the-ground violations of the NFMA and regulations beyond review." *This concern is misplaced insofar as the environmental groups still may challenge discrete site-specific sales allowed by the Forest Service.*

Id. at 568 (internal citation omitted; emphasis added). The court continued: "Requiring plaintiffs to challenge individual timber sales may place a higher burden on environmental groups wishing to monitor Forest Service management practices. However, this does not allow us to disregard the jurisdictional requirement of a final agency action." *Id.* at 569. The question presented in *Peterson* was very similar to that presented in *Lujan*, but markedly different from that presented here.

It is undisputed that § 706(1) *requires* a court, in an appropriate case, to "compel agency action unlawfully withheld or unreasonably delayed." Similarly, the "agency action" that is subject to review under both §§ 706(1) and (2) includes a "failure to act." 5 U.S.C. § 551(13). In the instant case no permit must issue before the challenged impairment of the wilderness study areas may occur, as was the case in *Lujan* and *Peterson*. Although it remains to be seen whether Respondents in this case can establish a "failure to act" to warrant relief under the APA, and it further remains to be seen what type of relief the courts would impose for such a failure, there is

nothing in either *Lujan* or *Peterson* that suggests that there simply is *no* set of facts on which Respondents could establish that the Forest Service has failed to comply with the statutory mandate in the MWSA. Neither of those cases holds that the scope of § 706(1) is limited to compelling an agency to perform an isolated, reviewable act, and the Petitioners cite no other authority for this proposition. If § 706(1) were so limited, then the Forest Service simply could stand by and allow a fleet of 200 humvee vehicles to enter a wilderness study area, wholly immune from review of the statutory command that it "*shall*, until Congress determines otherwise," maintain the existing wilderness character of these study areas.

For these reasons, review is not warranted in this case to resolve the asserted conflict between the decision of the Ninth Circuit and the decisions in *Lujan* and *Peterson*.

III. Review Should Be Denied Because the Decision of the Ninth Circuit Is Consistent with Established Principles of Judicial Review under the APA.

The limited and interlocutory ruling of the Ninth Circuit that the District Court may *consider* Respondents' claims under § 706(1) is consistent with the plain text of the statute and established principles of judicial review. Section 706(1) provides that a federal court "shall" "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1). By its unambiguous terms, the MWSA mandates that the Secretary of Agriculture "*shall, until Congress determines otherwise*," administer specific wilderness study areas in Montana "*so as to maintain their presently existing wilderness character* and potential for inclusion in the National Wilderness Preservation System." Pub. L. No. 95-150, § 3(a), 91 Stat. 1243 (1977) (emphasis added). The mandatory nature of the obligation at issue in this case could not be clearer, even if the agency retains substantial discretion regarding *how* it may

fulfill the statutory command. *See United States v. Monsanto*, 491 U.S. 600, 607 (1989) (noting, with regard to Congress's use of the word "shall," that "Congress could not have chosen stronger words to express its intent"); *Bennett v. Spear*, 520 U.S. 154, 175 (1997) ("any contention that the relevant provision of [law] . . . is discretionary would fly in the face of its text, which uses the imperative 'shall.'").

The government essentially contends that the agency's compliance (or failure to comply) with this mandate is unreviewable, even if the Forest Service were to wholly ignore it. The Ninth Circuit properly rejected the claim that there is no set of acts upon which Respondents could prove an entitlement to relief.

At the outset, it is significant that the APA *does* provide that certain agency activities are exempted from judicial review. Specifically, § 701(a) of the Act provides that a court may not review an agency's activities "to the extent that (1) statutes preclude judicial review; or (2) *agency action is committed to agency discretion by law.*" 5 U.S.C. § 701(a) (emphasis added). But it is equally significant that the government does *not* attempt to argue in its petition that the decision of the Ninth Circuit is wrong because the Forest Service's administration of the wilderness study areas in Montana is "committed to agency discretion by law" and therefore unreviewable. It seeks to accomplish that same result, but without trying to prove that this case falls within the explicit and narrow exception to judicial review created by Congress in the APA. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971) (holding that § 701(a)(2) exception to judicial review is "very narrow").

1. It is broadly established that, in an appropriate case, an agency may be compelled to comply with a nondiscretionary, but also non-ministerial, duty. For instance,

in *NAACP v. Secretary of Housing and Urban Devlopment*, 817 F.2d 149 (1st Cir. 1987), the First Circuit – in a unanimous opinion written by then-Circuit Judge Breyer – rejected the notion that the fact that an agency retains discretion regarding *how* to comply with a mandatory statutory duty means that the agency's alleged *failure* to fulfill that duty is unreviewable. The court emphasized that although HUD possessed "broad discretionary powers" with regard to the statutory command at issue, "[t]his fact . . . does not in itself mean that HUD is immune from review for 'abuse of discretion' in exercising those powers." *Id.* at 157. The court explained that such judicial review need *not* involve the court in managerial decisions or "in reweighing matters that Congress has asked HUD to balance," *id.* at 158; rather, a reviewing court could fashion an appropriate remedy "while at the same time preserving for the agency its discretionary options." *Id.* at 159.

The court in *NAACP* thus held that review of an agency's alleged failure to comply with a mandatory statutory duty was reviewable under both § 706(1) and § 706(2)(A) of the APA. The court concluded that to preclude such review under § 706(1) "would be inconsistent with the need to provide a 'hospitable interpretation' of the APA." *Id.* at 160 (internal citation omitted). Further, the court emphasized that "[t]he APA defines 'agency action' to include 'failure to act,'" and that "[t]he purpose of § 706(2)(A) is to provide for judicial review of agency action *and inaction* that falls outside its statutory power" and constitutes an "abuse" of the agency's "discretion." *Id.* (emphasis added).

Numerous other cases have also reached similar results. For instance, only last month the Eighth Circuit agreed with the First Circuit that HUD's compliance with its mandatory duty to promote fair housing, 42 U.S.C. § 3608(e)(5), is reviewable under the APA. *Darst-Webbe Tenant Ass'n Bd. v. St. Louis Housing Auth.*, 339 F.3d 702, 712-14 (8th Cir. 2003). And in

Public Citizen Health Research Group v. Commissioner, Food & Drug Administration, 740 F.2d 21, 32-35 (D.C. Cir. 1984), the District of Columbia Circuit held that a claim that the FDA had failed to require adequate warning labels on aspirin products as allegedly required by 21 U.S.C. § 352(h)(2) could be reviewed under the "unreasonably delayed" standard of § 706(1); *see also, e.g., Iowa ex rel. Miller v. Block*, 771 F.2d 347, 349-52 (8th Cir. 1985) (permitting review under APA of Secretary of Agriculture's failure to implement disaster relief programs); *Adams v. Richardson*, 480 F.2d 1159, 1161-63 (D.C. Cir. 1973) (upholding action against HEW under APA for failure to enforce antidiscrimination provisions of Title VI).

In these cases – as in the decisions of the Ninth and Tenth Circuits for which Petitioners now seek review – courts have recognized a distinction between compelling an agency to comply with a mandatory duty that required the exercise of discretion, on the one hand, and dictating *how* that discretion actually would be exercised, on the other hand. This critical distinction has long been recognized in the administrative context by this Court, as well. *See, e.g., Addison v. Holly Hill Fruit Prods.*, 322 U.S. 607, 622-23 (1944) ("This Court has on several occasions required the Interstate Commerce Commission to take jurisdiction when it declined to do so or to discharge a duty laid upon the Commission by statute. The district court would not be telling the Administrator how to exercise his discretion but would merely require him to exercise it. It is a remedy against inaction.") (citations omitted). In discussing § 706(1), the Attorney General's Manual – often cited by Petitioners – makes exactly this point. "Obviously the clause does not purport to empower a court to substitute its discretion for that of an administrative agency and thus exercise administrative duties. . . . However, . . . a court may require an agency to take action upon a matter, without directing how it shall act." Attorney General's Manual on the

Administrative Procedure Act, at 108 (1947). This Court has frequently upheld review of highly discretionary decisions where there was a specific statutory mandate and law to apply. *See Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221 (1986); *Dunlop v. Bachowski*, 421 U.S. 560 (1975); *United States ex rel. Kansas City Southern Ry. v. ICC*, 252 U.S. 178 (1920).

2. Petitioners also claim that § 706(1) only affords relief comparable to that afforded by a writ of mandamus. But even if true, the relief sought by Respondents is in no way contrary to the law of mandamus. In fact, the law of mandamus further supports the decision below.

Petitioners claim that mandamus is unavailable whenever agency action involves the exercise of discretion. The remedy afforded by mandamus, however, is not so limited. Rather, courts issue writs of mandamus even where the agency retains discretion to determine *how* to satisfy a statute's mandate. As this Court has recognized:

> Mandamus is employed to compel the performance, when refused, of a ministerial duty, this being its chief use. It also is employed to compel action, when refused, in matters involving judgment and discretion, but not to direct the exercise or judgment or discretion in a particular way nor to direct the retraction or reversal of action already taken in the exercise of either.

Wilbur v. United States ex rel. Kadrie, 281 U.S. 206, 218 (1930); *see also, e.g., Pennsylvania v. National Ass'n of Flood Insurers*, 520 F.2d 11, 26-27 (3d Cir. 1975), *overruled on other grounds*, *Pennsylvania v. Porter*, 659 F.2d 306 (3d Cir. 1981) (in case involving agency's alleged failure to act, "mandamus may issue to require the exercise of permissible discretion,

although the manner in which the discretionary act is to be performed is not to be directed by the court"); *Flynn v. Schultz*, 748 F.2d 1186, 1194 (7th Cir. 1984); *Edgerton v. Kingsland*, 168 F.2d 128, 130 (D.C. Cir. 1947). Thus, "even in an area generally left to agency discretion, there may well exist statutory . . . standards delimiting the scope or manner in which such discretion can be exercised. In these situations, mandamus will lie when the standards have been ignored or violated." *Carpet, Linoleum & Resilient Tire Layers, Local Union No. 419 v. Brown*, 656 F.2d 564, 566 (10th Cir. 1981) (quoting *Davis Assocs., Inc. v. Sec'y, Dep't of Hous. & Urban Dev.*, 498 F.2d 385, 389 & n.5 (1st Cir. 1974)).

In sum, the decisions of the Ninth and Tenth Circuits in these cases are wholly consistent with established principles of judicial review under the APA, as well as under the law of mandamus. There is nothing in these interlocutory rulings, which merely allow these proceedings to continue – without determining whether Respondents ultimately are entitled to relief under § 706(1) or other provisions of the APA, and without determining what that relief ultimately would be – that warrants the immediate intervention and review by this Court.

CONCLUSION

The petitions should be denied.

Respectfully submitted,

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